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CONTRACTUAL WAIVERS OF A RIGHT TO JURY TRIAL – ANOTHER OPTION

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I. INTRODUCTION

“Runaway Jury” and “Twelve Angry Men.” While juries have been the focus of several Hollywood studio films, these titles are not entertaining to defendants. They are, however, enough to instill fear in any employer that is facing an employee lawsuit. These titles can be especially disheartening to employers who face employee claims for everything from wrongful termination to sexual harassment in the workplace. Employers have, therefore, begun to experiment with pre-dispute contractual jury waivers.

It is well-settled that arbitration in the employment context is favored by the courts, and that there is a federal policy favoring arbitration agreements, in general.¹ However, jury waivers outside of arbitration in the employment context are still a

¹ *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). “[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.” *Id.*; see also 9 U.S.C. §§ 1-16 (2002).

relatively novel idea in some jurisdictions, despite the fact that an arbitration agreement itself inherently prevents the employee from having a jury trial. The Sixth Circuit Court of Appeals, as well as the Ohio Supreme Court, have yet to determine if jury waivers in employment contracts are binding. This paper will assess contractual jury trial waivers in the employment context as an alternative to arbitration or jury trials.

The Seventh Amendment to the United States Constitution provides citizens with the right to a trial by jury.² Part II of this Note explores this constitutional right and the circumstances in which waivers of that right will be upheld. Part III sets forth the four criteria that courts apply in assessing whether an individual's contractual waiver of rights will be enforced, as these criteria will certainly be applied by the courts in determining whether to enforce an employee's contractual waiver of the right to a jury trial.

Because arbitration involves an inherent waiver of the right to a jury trial, Part IV closely examines the courts' approach to mandatory arbitration in the employment context. Indeed, mandatory arbitration effectively waives an individual's right, not only to a *jury* trial, but also to a trial by *any* means, as the parties agree to resolve their disputes outside of the judicial process. Part IV also provides a brief history of arbitration and explains how arbitration differs from standard court proceedings.

Part V discusses the benefits of a jury trial waiver to both employers and employees as compared to arbitration agreements and full jury trials. It sets forth the basic incentives, including economic benefits, that might induce an employer or employee to consider a jury trial waiver.

Part VI explores the enforceability of an employee's contractual waiver of a jury trial in light of cases enforcing employees' contractual waivers of other rights. Because employees are able to waive other statutory and constitutional rights, they should also be able to waive their right to a jury trial. Part VII considers the plethora of case law confirming the ability to waive a jury trial outside of the employment context. It asserts that because the circumstances under which individuals effectively waive their rights to jury trials in non-employment matters do not differ substantially from employment disputes, an employee's contractual waiver should also be enforceable. Finally, Part VIII explores cases from other circuits in which jury waivers in the employment context have been enforced. It argues that the Sixth Circuit should also enforce such waivers by applying the rulings of the cases discussed in Parts VI and VII as well as recent commentary from other sources.

II. THE RIGHT TO A JURY TRIAL

The right to a jury trial is a fundamental, constitutional right. Indeed, the right is so fundamental that it is actually mentioned twice in the United States Constitution—in the Sixth and Seventh Amendments.³ Because the Sixth

² U.S. CONST. amend. VII.

³ U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ."). The Sixth Amendment applies to criminal cases, while the Seventh Amendment applies to civil cases. It is well known that a criminal defendant may waive a right to a jury trial. *See Patton v. United States*, 281 U.S. 276, 312 (1930). The main difference in analyzing waivers under the two amendments is that when a criminal is waiving his right, he is already in litigation (Amendment VI), while contracting parties are waiving their right *in advance* of any litigation (Amendment VII). Jeff Joyce &

Amendment applies only to criminal cases, it is inapplicable to this analysis. The Seventh Amendment, however, is pertinent to this analysis because it provides individuals the right to a jury trial in the civil context. The primary focus of this paper, therefore, is whether an employee may contractually waive this Seventh Amendment right in advance of any dispute arising out of his or her employment.

The Seventh Amendment, which has not been applied to the states through the Due Process Clause of the Fourteenth Amendment,⁴ provides that “[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.”⁵ The right to a jury trial is just that—a right, and not a requirement; hence, it can be waived.⁶ For example, in civil claims, the right may be waived simply by failure to raise it in the pleadings.⁷ In addition, the right may be waived by express agreement in open court or by consent.⁸

The Seventh Amendment right to a jury can also be knowingly and intentionally waived by contract in advance of a dispute.⁹ Such pre-dispute agreements waiving a right to trial by jury are neither illegal nor contrary to public policy.¹⁰ Indeed, in several non-employment cases, the Sixth Circuit has held that the jury trial right may be waived by pre-dispute contractual waivers.¹¹ While almost all states agree that the right may be waived, Georgia’s is the only state supreme court to find that pre-

Paul Simon, *How Can an Owner Protect His Company from a Jury of its “Peers”?: When Arbitration Isn’t the Answer*, HOUSTON BUS. J., May 13, 2004, available at [http://www.winstead.com/articles/articles/Litigation_Alternative%20Dispute%20Resolution%20\(Joyce%20&%20Simon%20-%20HBJ\).pdf](http://www.winstead.com/articles/articles/Litigation_Alternative%20Dispute%20Resolution%20(Joyce%20&%20Simon%20-%20HBJ).pdf) (last visited Oct. 28, 2005).

⁴ See *Walker v. Sauvinet*, 92 U.S. 90, 92 (1876).

⁵ U.S. CONST. amend. VII.

⁶ See *City of Cincinnati v. Bossert Mach. Co.*, 243 N.E. 2d 105, 107 (Ohio 1968) (“The right to a jury trial, though inviolate, may be waived.”).

⁷ FED. R. CIV. P. 38(d) provides: “The failure of a party to serve and file a demand as required by this rule constitutes a waiver by the party of trial by jury.”

⁸ See *Kearney v. Case*, 79 U.S. 275, 281-82 (1871) (“It seems, therefore, that both by express agreement in open court, and by implied consent, the right to jury trial could be waived.”).

⁹ *Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 832 (4th Cir. 1986); see also *Nat’l Equip. Rental, Ltd. v. Hendrix*, 565 F.2d 255, 258 (2d Cir. 1977); *N. Feldman & Son, Ltd. v. Checker Motors Corp.*, 572 F. Supp. 310, 313 (S.D.N.Y. 1983).

¹⁰ *K.M.C. Co. v. Irving Trust Co.*, 757 F.2d 752, 755 (6th Cir. 1985) (“It is clear that the parties to a contract may by prior written agreement waive the right to a jury trial.”); *Birch v. Al Castrucci, Inc. II*, No. CA 15123, 1995 Ohio App. LEXIS 3227, at *4 (Ohio Ct. App. Aug. 2, 1995); see also *Telum, Inc. v. E.F. Hutton Credit Corp.*, 859 F.2d 835, 837 (10th Cir. 1988).

¹¹ *K.M.C. Co.*, 757 F.2d at 755 (refusing to enforce a pre-dispute jury waiver in the context of a financing agreement because the waiver was not knowingly and voluntarily made when the financier specifically told the financee that the waiver would not be enforced); *In re S. Indus. Mech. Corp.*, 266 B.R. 827 (W.D. Tenn. 2001) (enforcing a pre-dispute jury waiver in a promissory note for the purchase of real property).

litigation contractual jury trial waivers are not enforceable.¹² The Supreme Court of Georgia reached its conclusion in part on the comparison of the waiver of a jury trial to a confession of judgment, calling them “sufficiently analogous” to each other.¹³

It is important to understand that the right to a jury trial is not a right per se. The case must first be deemed justiciable. The right to have a jury hear the case is applicable “only once it is determined that the litigation should proceed before a court.”¹⁴ However, once the right attaches, the courts will indulge every reasonable presumption against a waiver since it is a constitutional right.¹⁵

The federal standard for determining whether a contractual waiver of a right to a jury trial is valid is whether the waiver was made in a “knowing, voluntary, and intelligent manner.”¹⁶ The Sixth Circuit has held that parties may waive the right to a jury trial through prior written agreement, as long as the waiver was made “knowingly and voluntarily.”¹⁷ Still other courts have set the bar at “knowingly and intentionally.”¹⁸

Circuits are divided as to whether the party seeking the enforcement of the waiver or the party seeking to have the waiver declared unenforceable has the burden of proof with respect to the above standard. The Sixth Circuit has expressly adopted the view that a contractual jury trial waiver is presumptively valid, and that the party seeking to avoid the waiver bears the burden of demonstrating that its consent was not knowing and voluntary.¹⁹ Other circuits require the party seeking to enforce the waiver to carry the burden.²⁰

¹² Chad Schultz, *The Jury's Still Out – Way Out: Subtracting the Jury From the Equation Decreases Uncertainty in Employment Cases*, HR MAGAZINE, Jan. 1, 2005, at 97.

¹³ Bank S., N.A. v. Howard, 444 S.E.2d 799, 800 (Ga. 1994).

¹⁴ Cooper v. MRM Inv. Co., 367 F.3d 493, 506 (6th Cir. 2004). The right is “only the right to have a jury hear the case once it is determined that the litigation should proceed before a court. If the claims are properly before an arbitral forum pursuant to an arbitration agreement, the jury trial right vanishes.” *Id.* (quoting Bank One, N.A. v. Coates, 125 F. Supp. 2d 819, 834 (S.D. Miss. 2001)).

¹⁵ Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937); RDO Fin. Servs. Co. v. Powell, 191 F. Supp. 2d 811, 813 (N.D. Tex. 2002); *see also* Nat'l Equip. Rental, Ltd. v. Hendrix, 565 F.2d 255, 258.

¹⁶ RDO Fin. Servs. Co., 191 F. Supp. 2d at 813.

¹⁷ K.M.C. Co., v. Irving Trust Co., 757 F.2d 752, 755 (6th Cir. 1985) (applying the “knowing and voluntary” standard in affirming the trial court’s ruling, although the trial judge had applied the “knowing, voluntary and intentional” standard). Courts in other circuits have recognized this principle as well. *Nat'l Equip. Rental Ltd.*, 565 F.2d at 258; *Northwest Airlines, Inc. v. Air Line Pilots Assoc. Int'l*, 373 F.2d 136, 142 (8th Cir. 1967).

¹⁸ *Nat'l Equip. Rental, Ltd.*, 565 F.2d at 258; *Telum, Inc. v. E.F. Hutton Credit Corp.*, 859 F.2d 835, 837 (10th Cir. 1988).

¹⁹ *K.M.C. Co.*, 757 F.2d at 758.

²⁰ *First Union Nat'l Bank v. United States*, 164 F. Supp. 2d 660, 663 (E.D. Pa. 2001); *N. Feldman & Son, Ltd. v. Checker Motors Corp.*, 572 F. Supp. 310, 313 (S.D.N.Y. 1983) (“[T]he party seeking to enforce [the waiver] must demonstrate that the consent was both voluntary and informed.”).

Although the right to a jury trial is part of the hallmark of the American judicial system, constitutionally guaranteed in two amendments, the right to a jury trial is actually very seldom used. Most federal civil cases that are initiated never reach litigation. In 2002, almost 98 percent of federal civil cases were resolved before trial.²¹ The number of cases going to trial has declined markedly since 1975.²² In the employment arena, in particular, only five percent of cases proceeded to trial in 1998.²³ So, one may ask: why all the debate over jury trial waivers? There are two reasons why jury waivers are important, despite the relatively low occurrence of jury trials: First, the right to a jury trial is a *constitutional* right.²⁴ For those individuals who choose to exercise that right, i.e., those who do not knowingly and voluntarily decide to contract it away, the right should be protected.

Second, and less obvious, is the fact that the *potential* for a jury trial can give the plaintiff's attorney significant leverage when bargaining with an employer who may be worried about what a *potential* jury may decide. Part of that potential is reflected in the unpredictability of the ultimate outcome of jury trials.²⁵ If there is no right to a jury trial, or if it has been contracted away, then the bargaining power of the plaintiff may be greatly reduced in some situations. The unpredictability of jury trials is a tool that plaintiffs' attorneys use as a leverage for settlement.²⁶ In addition, corporate defendants believe that juries tend to be partial to plaintiffs and will be more willing to resolve the case in the plaintiff's favor and award larger damages. In one study which assessed 53 of the largest awards between 1985 and 2002, 52 of the awards were declared by juries, while only one was instituted by a judge.²⁷ For this reason, plaintiffs are more likely to demand jury trials when the potential damages are larger.

²¹ Leonidas R. Mecham, *Judicial Business of the United States Courts*, 2003 Annual Report of the Director, 123, 162 (2003), at <http://www.uscourts.gov/judbususc/judbus.html> (last visited October 12, 2005) (providing that 5,830 trials of 253,015 terminated civil cases in the year ending September 30, 2003, and only 2,603 (44% of the trials) were tried before a jury).

²² Susan K. Gauvey, *ADR's Integration in the Federal Court System*, 34 MD. B. J. 36, 41 (2001) (observing that the rate of civil cases proceeding to federal court was 8.4% in 1975, 4.7% in 1985, 3.2% in 1995, and 2.3% in 2000).

²³ Michael H. LeRoy & Peter Feuille, *Private Justice in the Shadow of Public Courts: The Autonomy of Workplace Arbitration Systems*, 17 OHIO ST. J. ON DISP. RES. 19, 22 n.6 (2001). The percentage of employment cases proceeding to litigation in 1998 was significantly less than in 1990, when as many as 9% of employment cases were resolved in the court system. *Id.*

²⁴ U.S. CONST. amend. VII.

²⁵ See generally Schultz, *supra* note 11, at 97 ("Jurors inevitably bring varying perspectives and backgrounds to the jury box and use those experiences like a prism to see facts and events in ways impossible to anticipate. The naked truth is that it is tricky to predict how a jury will respond to any set of facts.").

²⁶ *Id.*

²⁷ John Hersch & W. Kip Viscusi, *Punitive Damages: How Judges and Juries Perform*, (Harvard Faculty Discussion Paper No. 362, May 2002), available at http://www.law.harvard.edu/programs/olin_center/papers/362_viscusi.php. The awards discussed were all greater than \$100 million. *Id.* "The jury awards in these large cases were highly unpredictable and were weakly correlated with compensatory damages." *Id.*

Both plaintiffs and defendants are more likely to demand a jury trial when the disparity in costs between trial forums is smaller.²⁸ Thus, even though many disputes are resolved before trial, and the right to a jury trial is never actually invoked, the right has great importance in the legal process by providing plaintiffs with significant leverage. If there is no right to a jury trial (or it has been contracted away), then the amount of a plaintiff's bargaining power may be significantly reduced.

III. STANDARDS FOR AN EMPLOYEE'S ABILITY TO WAIVE RIGHTS BY CONTRACT

As previously discussed, an individual can waive his or her right to a jury trial by contract. In construing a contractual waiver of rights, courts will look at the plain meaning of the contractual language and will not override the clear and unambiguous language in which the parties have expressed their intent.²⁹

The contractual waiver of any constitutional right must be made knowingly and voluntarily.³⁰ In applying this standard, courts have considered four factors: 1) disparity in bargaining power between the parties, 2) business sophistication, 3) opportunity to negotiate the terms, and 4) conspicuousness of the waiver.³¹ The decision of the Second Circuit in *National Equipment Rental Ltd. v. Hendrix* is generally cited as the standard for jury trial waivers.³² To determine the enforceability of a pre-dispute contractual waiver of a jury trial in the employment context, each of these criteria must be considered.

A. Disparity in Bargaining Power

The first factor courts consider in determining whether to enforce a contractual waiver is the disparity of bargaining power between the parties.³³ Where the parties are of approximately equal bargaining power, courts will be more likely to enforce the jury waiver. This factor is especially significant in the employment context, where an employer may be deemed to have greater bargaining power than a prospective employee.³⁴

²⁸ Joni Hersch, *Jury Demands and Trials*, (Harvard Faculty Discussion Paper No. 447, Nov. 2003), available at http://www.law.harvard.edu/programs/olin_center/papers/pdf/447.pdf.

²⁹ *Alexander v. Buckeye Pipeline Co.*, 374 N.E.2d 146, 150 (1978) (citing *First Nat'l Bank v. Houtzer*, 96 Ohio St. 404, 406-07 (1917)); *Truck World, Inc. v. Fifth Third Bank*, Nos. C-940029, C-940399, 1995 Ohio App. LEXIS 4382, at *11-12 (Ohio Ct. App. Sept. 29, 1995).

³⁰ *Brady v. United States*, 397 U.S. 742, 748 (1970); *Garcia v. Wayne Homes*, 2001 CA 53, 2002 Ohio App. LEXIS 1917, at *38 (Ohio Ct. App. Apr. 19, 2002).

³¹ *Cooper v. MRM Inv. Co.*, 367 F.3d 493, 508 (6th Cir. 2004); *First Union Nat'l Bank v. United States*, 164 F. Supp. 2d 660, 663 (E.D. Pa. 2001).

³² Samuel Eistreich & Rene M. Johnson, *Contractual Jury Trial Waivers in Federal Employment Litigation*, N.Y.L.J., May 2, 2003, at 3.

³³ See *First Union Nat'l Bank*, 164 F. Supp. 2d at 663; *Cooper*, 367 F.3d at 508.

³⁴ "[T]he employer holds the crucial card – the offer of employment – and therefore has an inherent bargaining advantage." Ryan P. Steen, *Paying for Employment Dispute Resolution: Dilemmas Confronting Arbitration Cost Allocation Throw the Arbitration Machine Into Low Gear*, 7 J. SMALL & EMERGING BUS. L. 181, 182 (2003).

There are several cases addressing the disparity of bargaining power in waiving the right to a jury trial outside the employment context. In *Hendrix*, the court found a “gross inequality in bargaining power” when, in a lease agreement, the lessee did not have any choice but to accept the lessor’s contract as written if he was to obtain the funds he needed.³⁵ Yet, not all differences in bargaining power will equate to a disparity that voids the waiver. In *Morgan Guaranty Trust v. Crane*, the district court found a difference in bargaining power where two individuals bargained with a major bank.³⁶ The court stated that the two individuals were not “financial neophytes” and had the ability to negotiate with the bank.³⁷

A few courts have considered the disparity of bargaining power within the employment context. In one case, *Cooper v. MRM*, the Sixth Circuit went so far as to distinguish different types of prospective employees based on their relative amounts of bargaining power. The issue before the court in *Cooper* was whether the employer could compel arbitration of a Title VII claim since the employee had signed a document agreeing to arbitration of employee rights.³⁸ The court held that prospective employees in the fast food industry have less bargaining power than those seeking white collar jobs.³⁹ It determined that the disparity in bargaining power is relevant to both procedural as well as substantive unconscionability analysis since an applicant “who lacks ‘leverage’ may be more likely to agree to unfair terms.”⁴⁰

Disparity of bargaining power alone, however, will probably not render an otherwise enforceable jury trial waiver unenforceable. The Supreme Court, in *Gilmer v. Interstate/Johnson Lane Corp.*, stated that mere inequality in bargaining power in employment arbitration agreements is not sufficient reason to hold the agreement to be unenforceable.⁴¹ Accordingly, the Sixth Circuit has been unwilling to set aside contractual jury waivers because of lesser bargaining power alone.⁴²

³⁵ Nat’l Equip. Rental, Ltd. v. Hendrix, 565 F.2d 255, 258 (2d Cir. 1977) (“This gross inequality in bargaining power suggests, too, that the asserted waiver was neither knowing nor intentional.”).

³⁶ Morgan Guar. Trust Co. v. Crane, 36 F. Supp. 2d 602, 604 (S.D.N.Y. 1999).

³⁷ *Id.* The Cranes had established relationships with a number of Morgan officials and had previously negotiated changes in agreements made with Morgan. These facts demonstrated their ability to negotiate with the bank. While it is very unusual to find this type of relationship in an employment setting with a prospective employee, it can also be argued that this level of sophistication would not be required by employees, since very few would have it.

³⁸ *Cooper*, 367 F.3d at 496–97.

³⁹ *Id.* at 504. The white collar jobs referred to in this case were specifically in the brokerage industry.

⁴⁰ *Id.*

⁴¹ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991). Although this case dealt with arbitration agreements, the same standards would arguably be applied to pre-contractual jury waivers outside of arbitration. Any waivers outside of arbitration, if determined to be acceptable, would probably have to pass the same set of standards, including the bargaining power test.

⁴² *Cooper*, 367 F.3d at 505 (“Under [the district court’s approach] ‘practically every condition of employment would be an ‘adhesion contract’ which could not be enforced

Thus, disparity in bargaining power must be considered together with the remaining three criteria that courts apply in determining whether to uphold a contractual waiver of a right guaranteed in the Constitution.

B. Business Sophistication

The second factor courts consider in determining whether a constitutional right has been knowingly and voluntarily waived is the business sophistication of both parties. Courts are more likely to enforce a jury waiver where the party who submits to the jury waiver has some level of business sophistication. For example, in *Telum v. E.F. Hutton Credit*, the Tenth Circuit remanded for a new trial without a jury based, in part, on the equality in bargaining power.⁴³ In *Telum*, the two parties were relatively sophisticated corporations that were involved in an agreement for an oil rig. *Telum* was to lease a rig from a third party oil exploration company, take the tax credits, and then sub-lease it back.⁴⁴ Although the case involved two parties that were at an almost identical sophistication level, the parties need not necessarily be at the same level. The court in *Brown v. Cushman and Wakefield, Inc.*, for example, upheld a contract where one party was an individual and the other, a corporation.⁴⁵

While the sophistication of banks, employers, and major corporations is usually clear, courts have held other parties to a fairly high standard. Some courts have found adequate sophistication only where a party was either found to be a business owner himself, had established lengthy business relationships, or was being loaned such lofty amounts that the lender would not have financed to an otherwise inexperienced party.⁴⁶ For example, the court in *Morgan Guaranty Trust Co. v. Crane* found adequate sophistication in the signors of several promissory notes from a bank by noting that they were the inventors, founders, presidents, and CEO's of a publicly traded company, had previously organized a buy-out of founding shareholders, and had negotiated agreements to license intellectual and industrial property.⁴⁷

Although the above examples have satisfied some courts as to adequate business sophistication, the presence of these factors alone is not always enough to meet this high standard, especially if there are other mitigating circumstances. *First Union*

because it would have been presented to the employee by the employer in a situation of unequal bargaining power on a 'take it or leave it' basis.'"(quoting *Beauchamp v. Great W. Life Assurance Co.*, 918 F. Supp. 1091, 1098-99 (E.D. Mich. 1996)). Importantly, the court in *Cooper* specifically stated that "[w]hen a party . . . voluntarily agrees to something in an attempt to obtain employment, they are not being 'forced' to do anything" (quoting *EEOC v. Frank's Nursery & Crafts*, 966 F. Supp. 500, 504 (E.D. Mich. 1997)) *rev'd on other grounds* 177 F.3d 448 (6th Cir. 2003). *Id.* at 504.

⁴³ *Telum, Inc. v. E.F. Hutton Credit Corp.*, 859 F.2d 835, 837 (10th Cir. 1988).

⁴⁴ *Id.* at 836.

⁴⁵ *Brown v. Cushman & Wakefield, Inc.*, 235 F. Supp. 2d 291 (S.D.N.Y. 2002); *see also* *Melanson v. Browning Ferris Indus.*, No. 00-12102-RWZ, 2001 U.S. Dist. LEXIS 13270, at *6 (D. Mass. May 25, 2001) (plaintiff was an intelligent and literate adult signing a release when being laid off).

⁴⁶ *See In re S. Indus. Mech. Corp. (Blurton v. Fesmire)*, 266 B.R. 827 (W.D. Tenn. 2001); *N. Feldman & Son, Ltd. v. Checker Motors Corp.*, 572 F. Supp. 310 (S.D.N.Y. 1983).

⁴⁷ *Morgan Guar. Trust Co. v. Crane*, 36 F. Supp.2d 602 (S.D.N.Y. 1999).

National Bank v. United States provides an example.⁴⁸ In *First Union*, while the court noted that the defendant was the president of two corporations, it focused more on the fact that he had executed the signature pages of the documents in question alone, without seeing or reviewing the actual documents. The court considered such actions to be the reverse of what ordinarily would be expected from a sophisticated businessman and therefore ruled that the defendant had not reached the appropriate level of sophistication for a knowing and intelligent waiver.

C. Opportunity to Negotiate the Terms

The third factor courts consider in determining whether the waiver of a constitutional right is knowing and voluntary is whether the party against whom it is being enforced had a meaningful opportunity to negotiate the terms.⁴⁹ Courts are more likely to enforce a jury waiver where the party who submitted to the jury waiver negotiated the provision or voluntarily chose to forgo the opportunity to negotiate. One commentator suggests that where an employee negotiates other provisions in the employment agreement, but fails to negotiate the jury waiver, the employee has implicitly accepted the waiver provision.⁵⁰

Courts have considered two factors in analyzing an employee's opportunity to negotiate: the employee's educational background and the length of time the employee was given to review the contract. For example, in *Brown*, the district court made special mention of the employee's Harvard M.B.A. and past work history in determining that she had an opportunity to negotiate a contract.⁵¹ In *Brennan v. Bally Total Fitness*, the same court held that an arbitration agreement was unenforceable because the employee was given only 15 minutes to review a 16-page document.⁵²

D. Conspicuousness of the Waiver

The fourth factor considered by courts in determining whether a waiver has been knowingly and voluntarily made is the conspicuousness of the waiver. While there are no special requirements for a waiver to be conspicuous, courts look at whether the terms are highlighted, the size of the font used, the typeface, and the location of

⁴⁸ *First Union Nat'l Bank v. United States*, 164 F. Supp. 2d 660 (E.D. Pa. 2001).

⁴⁹ *Id.* at 663; *Cooper v. MRM Inv. Co.*, 367 F.3d 493, 508 (6th Cir. 2004).

⁵⁰ Axley Brynson, *Seventh Circuit Hasn't Yet Decided if Jury Trials can be Waived Contractually*, 13 WIS. EMP. L. LETTER, Sept. 2004.

⁵¹ *Brown v. Cushman & Wakefield, Inc.*, 235 F. Supp. 2d 291, 293-94 (S.D.N.Y. 2002). The court considered the plaintiff's work history as an investment banker. The educational background and employment experience enabled the court to reject plaintiff's argument that she never read the employment agreement before signing it. However, a Harvard M.B.A. and investment banking experience would not be *necessary* for waiving the right to a jury trial. That is, employees lawfully waive their right to a jury trial everyday in the context of arbitration agreements. Moreover, an employer could allow the employee additional time to review the contract so that the employee can consult with his attorney for advice regarding individual clauses within the employment agreement.

⁵² *Brennan v. Bally Total Fitness*, 198 F. Supp. 2d 377, 383 (S.D.N.Y. 2002). Note, however, that the court found the employer engaged in other high-pressure tactics as well.

waivers in the document.⁵³ In *Morgan Guaranty*, the court found the jury waiver provision to be “quite conspicuous” because it was written in all capitals in the last sentence of the only paragraph located on the signature page, directly before the Cranes’ signatures.⁵⁴ By contrast, the Tenth Circuit has deemed normal size print to be sufficient. In *Telum*, for example, the court enforced a jury waiver which was written in the same print size as the rest of the contract.⁵⁵

Courts have been unwilling to enforce waivers written in small print or buried in the middle of a lengthy contract. As the Second Circuit has stated in *Hendrix*, “[a] printed form provision buried in a multitude of words is too weak an imitation of a genuine agreement to be treated as a waiver of so important a constitutional safeguard.”⁵⁶ In *Hendrix*, the waiver was buried in the eleventh paragraph of a fine print, 16-clause lease agreement.⁵⁷ Similarly, in *RDO Financial Services Co. v. Powell*, the court refused to enforce the waiver because of the very small font size and the fact that the waiver was buried in the middle of a lengthy paragraph and not set off from the rest of the text in bold print.⁵⁸

IV. ARBITRATION

An understanding of mandatory arbitration agreements is critical to the exploration of pre-dispute contractual jury trial waivers in the employment context because an arbitration agreement inherently involves a waiver of the right to a jury trial. In arbitration, the parties present their case to a neutral third party decision-maker instead of a judge, jury, or administrative agency.⁵⁹ The arbitrator renders a

⁵³ *Connecticut Nat’l Bank v. Smith*, 826 F. Supp. 57, 59 (D. R.I. 1993); *see also* *Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 833 (4th Cir. 1986) (enforcing the jury waiver provision even though it was not set off in its own paragraph or highlighted); *N. Feldman & Son, Ltd. v. Checker Motors Corp.*, 572 F. Supp. 310, 312–13 (S.D.N.Y. 1983) (enforcing the jury waiver provision even though it was not set off in its own paragraph or highlighted).

⁵⁴ *Morgan Guar. Trust Co. v. Crane*, 36 F. Supp. 2d 602, 604 (S.D.N.Y. 1999); *see also* *Nat’l Westminster Bank, U.S.A. v. Ross*, 130 B.R. 656, 667–68 (S.D.N.Y. 1991) (finding a waiver conspicuous when placed in its own paragraph within two inches of the signature line); *Buraczynski v. Eyring*, 919 S.W.2d 314, 321 (Tenn. 1996) (enforcing the arbitration agreement where the words “By signing this contract you are giving up your right to a jury or court trial” were in red ink, all capital letters, and directly above the signature line); *First Union Nat’l Bank v. United States*, 164 F. Supp. 2d 660, 665 (E.D. Pa. 2001) (enforcing a stand-alone contractual jury trial waiver in a loan agreement where the jury waiver provision was written in all capital letters under a section entitled “Waiver of Jury Trial”).

⁵⁵ *Telum, Inc. v. E.F. Hutton Credit Corp.*, 859 F.2d 835, 837 (10th Cir. 1988) (holding that font-type need be less conspicuous where both parties are sophisticated).

⁵⁶ “[I]t exhausts credulity to think that they or any other layman reading these legalistic words would have known or even suspected that they amounted to [such] an agreement.” *Nat’l Equip. Rental, Ltd. v. Hendrix*, 565 F.2d 255, 258 (2d Cir. 1977) (Black, J., dissenting) (quoting *Nat’l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 332–33 (1964)).

⁵⁷ *Id.*

⁵⁸ *RDO Fin. Servs. Co. v. Powell*, 191 F. Supp. 2d 811, 814 (N.D. Tex. 2002).

⁵⁹ For a complete discussion of the role of the Arbitrator, see *LeRoy & Feuille*, *supra* note 22, at 19.

decision, which is typically final and binding on both parties.⁶⁰ Thus, an arbitration clause removes the initial resolution of the dispute from the court system altogether. Arbitrators' decisions are rarely appealed to a judge and only in a limited number of those cases are their decisions overturned.⁶¹ This section will provide an overview of the court's approach to arbitration agreements in the employment context.

Prior to the enactment of the Federal Arbitration Act (FAA) in 1925, courts had long been unwilling to enforce agreements to arbitrate. In fact, one court discussing the prior state of the law surrounding compelled arbitrations, commented that courts in the past considered arbitrations to be "nothing less than a drain on their own authority to settle disputes."⁶² In 1925, however, the United States Congress passed the FAA, which approved of arbitration agreements.⁶³ The FAA governs actions in state and federal courts that involve a "contract evidencing a transaction involving commerce."⁶⁴

The purpose of the FAA was "to place arbitration agreements upon the same footing as other contracts,"⁶⁵ and the passage of the Act had that effect. In 1991, however, the Supreme Court, in *Gilmer v. Interstate/Johnson Lane Corp.*, held that arbitration agreements in the employment context are enforceable under the FAA.⁶⁶ Accordingly, after the *Gilmer* decision, the use of arbitration clauses grew dramatically.⁶⁷ Ten years later, in *Circuit City Stores, Inc. v. Adams*, the Supreme Court held that the FAA applies to employment agreements other than those involving transportation workers, thus reducing the scope of the FAA's exemption clause regarding workers employed in interstate commerce.⁶⁸ *Circuit City's* effect on

⁶⁰ Gregory T. Alvarez & Nancy J. Arencibia, *Is Arbitration Right for Your Company?*, FIN. EXEC., Dec. 1, 2002, at 46.

⁶¹ *Id.*

⁶² *Raasch v. NCR Corp.*, 254 F. Supp. 2d 847, 853 (S.D. Ohio 2003).

⁶³ 9 U.S.C. §§ 1-15 (2002).

⁶⁴ *Id.* § 2. Commentators have noted that the FAA originally meant to apply only to disputes between merchants, and not those in employment contracts. See Larry Pittman, *The Federal Arbitration Act: The Supreme Court's Erroneous Statutory Interpretation, Stare Decisis, and a Proposal for Change*, 53 ALA. L. REV. 789, 826 (2002); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 647 (1996).

⁶⁵ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

⁶⁶ *Id.*

⁶⁷ Although in 1991 less than 4% of employers used arbitration, this percentage rapidly increased. Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777, 779-80 (2003). In 1997, 19% of private employers used employment arbitration and by 1998, 62% of large corporations had used arbitration on at least one occasion. *Id.* at 780; see also *Alternative Dispute Resolution: Most Large Employers Prefer ADR as Alternative to Litigation, Survey Says*, DAILY LAB. REP., May 14, 1997, at A4 (reporting that 79% of 530 Fortune 1,000 companies use arbitration).

⁶⁸ *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 120 (2001). The FAA contains an exemption clause, which excludes certain types of workers, including those "involved in

the number of arbitration agreements was similar to *Gilmer*'s.⁶⁹ In addition to the Supreme Court's decision to enforce mandatory arbitration agreements in the employment context, the passage of the Civil Rights Act of 1991 (CRA) made arbitration more appealing to employers. First, the CRA made jury trials and compensatory and punitive damages widely available to employees in federal employment discrimination actions.⁷⁰ Employers wishing to avoid jury trials and punitive damages began to find arbitration a more preferable option. As one observer noted, "use of Alternative Dispute Resolution (Arbitration) started when juries became rampant."⁷¹ Second, the majority of circuit courts of appeal have concluded that the CRA, in Section 118, explicitly endorsed, and even encouraged the use of arbitration to resolve disputes arising under Title VII.⁷²

The FAA favors arbitration in many types of disputes.⁷³ Both the Supreme Court and Ohio Supreme Court have endorsed arbitration in the employment law context.⁷⁴ Both Ohio courts and federal courts encourage arbitration to settle disputes.⁷⁵ Part of this encouragement is no doubt motivated by the desire to decrease caseloads

interstate commerce." Prior to the *Adams* decision, some of the circuit courts were applying the FAA's exemption clause to a broader range of employees. The *Adams* court opted for the narrower interpretation of the FAA's exemption clause "involving interstate commerce" by holding that the FAA's exemption applied only to workers actually engaged in the movement of goods in interstate commerce. *Id.* at 122–23. An arbitration clause "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2002).

⁶⁹ Martin Malin, *Ethical Concerns in Drafting Employment Arbitration Agreements after Circuit City and Green Tree*, 41 BRANDEIS L.J. 779, 785 (2003) (citing a 75% increase in the number of companies with arbitration agreements).

⁷⁰ Stephen F. Fink, *Bench Trials or Bust!*, THE RECORDER, Feb. 19, 2003. Prior to 1991, employees brought about 8,000 – 9,000 federal employment discrimination cases per year, with employers winning most of them. *Id.* Since 1991, employers have lost approximately half of the cases tried to a jury, while the filing rate has almost tripled. *Id.*

⁷¹ *Focus on Arbitration*, 2001 BUREAU NAT'L AFF., INC., June 12, 2001, at 48 (observing that 90% of jury cases in the world are conducted in the United States).

⁷² *Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361, 365 (7th Cir. 1999).

We . . . concur with the majority of circuits that have held that Congress did not intend Title VII to preclude enforcement of pre-dispute arbitration agreements [O]n its face, the text of § 118 evinces a clear Congressional intent to encourage arbitration of Title VII and ADEA claims, not to preclude such arbitration. . . . [I]t seems most reasonable to read this clause as a reference to the FAA.

Id. (quoting *Seus v. John Nuveen & Co.*, 146 F.3d 175, 183 (3rd Cir. 1998)).

⁷³ "A written provision . . . to settle by arbitration a controversy . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2002).

⁷⁴ *Cooper v. MRM Inv. Co.*, 367 F.3d 493, 498–99 (6th Cir. 2004) (citing *Circuit City Stores v. Adams*, 532 U.S. 105, 122–23 (2001)); see also *Williams v. Aetna Fin. Co.*, 700 N.E. 2d 859, 865 (Ohio 1998).

⁷⁵ See *Garcia v. Wayne Homes*, No. 2001 CA 53, 2002 Ohio App. LEXIS 1917, at *28 (Ohio Ct. App. Apr. 19, 2002) ("[A]n arbitration clause is to be upheld just as any other provision in a contract should be respected.").

through the use of arbitration. Notably, more than 20 percent of new federal civil suits are employment cases.⁷⁶ The Court, in *Circuit City*, held that employment agreements containing arbitration clauses are enforceable under federal law, thus protecting these agreements under the FAA.⁷⁷ This decision has led courts to interpret the FAA as expressing a strong public policy in favor of arbitration. As the *Gilmer* court stated, “having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.”⁷⁸

A number of statutes also reinforce this strong public policy favoring the use of arbitration.⁷⁹ The strong public policy for arbitration is one of the largest hurdles for those arguing, as is this author, for the enforcement of stand-alone jury trial waivers outside the arbitration context, because such waivers are not backed by the strong support of federal legislation like the FAA.⁸⁰ Since the 1980s, the Supreme Court has endorsed the proposition that arbitration clauses should be upheld and, in fact, today most are.⁸¹ Due to this statutory and case law support for arbitration, there has been an increasing trend towards the use of arbitration in the employment context.⁸²

Even though arbitration agreements have such strong statutory and common law support, they are still controversial for many reasons: (1) arbitration eliminates a plaintiff's access to courts and juries; (2) arbitration is a very costly method of dispute resolution; (3) there is a concern that the arbitrators, who are for the most part selected by and paid by the employers, will not be truly neutral; (4) arbitration does not provide as full an array of remedies as are available in the court system, such as punitive damages; (5) arbitration does not allow for class actions and significantly curtails the amount of discovery available to the parties.⁸³ Plaintiffs'

⁷⁶ See Jeffrey P. Ayres, *Common Labor Law Remedies: A Millennium of Retrenchment*, Nov. 20, 2002, at http://www.venable.com/publication.cfm?action=view&publication_ID=986&publication_type_id=3 (last visited October 16, 2005).

⁷⁷ Mark N. Reinhartz & Terence M. O'Neil, *How to Avoid a 'Runaway Jury,'* EMP. L. STRATEGIST, Apr. 2003, at 1.

⁷⁸ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 474 U.S. 614, 628 (1985)).

⁷⁹ See The Civil Rights Act of 1991, 42 U.S.C. § 1981 (2002); see also The Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2002); The Civil Justice Reform Act, 28 U.S.C. § 471 (2002).

⁸⁰ See *supra* Part II.

⁸¹ Jean R. Sternlight, *The Rise and Spread of Mandatory Arbitration as a Substitute for the Jury Trial*, 38 U.S.F. L. REV. 17, 19-20 (2003).

⁸² *Cooper v. MRM Inv. Co.*, 367 F.3d 493, 502 (6th Cir. 2004) (stating that even if a prospective employee decides to walk away from one arbitration contract, “they will often have no choice but to accept another employment contract that mandates arbitration as well”) (citing *Cooper v. MRM Inv. Co.*, 199 F. Supp. 2d 771, 778 (M.D. Tenn. 2002)).

⁸³ Sternlight, *supra* note 81, at 18-19.

attorneys have also expressed concern over the extent of control employers have in the discovery phase in arbitration.⁸⁴

In *Cole v. Burns International Security Services*, the judge stated that five requirements were necessary for an arbitration agreement to be enforceable: (1) neutral arbitrator, (2) more than minimal discovery, (3) written award, (4) relief available similar to that available in court, and (5) no unreasonable costs to employees.⁸⁵ These will be explored in more detail in the following section.

While arbitration agreements deny the jury trial right to the party signing the waiver,⁸⁶ such agreements need not include a jury waiver provision in them to further alert the party waiving the right of their loss of this privilege.⁸⁷ In addition to the advantages of arbitration, there are many disadvantages of arbitration.⁸⁸ As one commentator has noted, “there is evidence that some if not many employers utilize arbitration procedures that are in one or more respects one-sided.”⁸⁹

V. BENEFITS OF BENCH TRIALS AS AN ALTERNATIVE TO ARBITRATION AND TO A JURY TRIAL

Corporate defendants tend to prefer judges and arbitrators over juries, while “[t]he civil rights community, consumer advocates, and the plaintiffs’ bar prefer judges over arbitrators and seek to protect access to juries.”⁹⁰ However, jury trial waivers offer more benefits to potential employees as well as employers as compared to both arbitration and full jury trials.

A. Benefits of Bench Trials to Employees

Employees enjoy many benefits in bench trials as compared to arbitration agreements. One benefit is having an impartial judge resolve the dispute, rather than an arbitrator whose neutrality may be questionable. As previously mentioned,

⁸⁴ *Focus on Arbitration*, 2001 BUREAU NAT’L AFF., INC., June 12, 2001, at 48 (quoting a plaintiff’s attorney, who stated the following: “The employer has 90 percent of the evidence . . . , while the plaintiff needs much more discovery”).

⁸⁵ See Malin, *supra* note 69, at 789 (citing *Cole v. Burns Int’l Sec. Serv.*, 105 F.3d 1465 (D.C. Cir. 1997)).

⁸⁶ “If the claims are properly before an arbitral forum pursuant to an arbitration agreement, the jury trial right vanishes.” *Bank One, N.A. v. Coates*, 125 F. Supp. 2d 819, 834 (S.D. Miss. 2001), *aff’d* 34 Fed. App. 964 (5th Cir. 2002).

⁸⁷ *Burden v. Check Into Cash*, 267 F.3d 483, 492 (2001) (“The loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate.”) (quoting *Sydnor v. Consecro Fin. Servs. Corp.*, 252 F.3d 302, 307 (4th Cir. 2001)).

⁸⁸ See Schultz, *supra* note 25, at 97. These will be discussed in more detail in the following section, but include 1) the potential bias of the arbitrator, 2) tendency to “split the baby,” and 3) the costs of arbitration.

⁸⁹ Joseph Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of Gilmer*, 14 HOFSTRA LAB. & EMP. L.J. 1, 5 (Fall 1996) (including prohibiting attorneys, prohibiting damages beyond those for actual losses, and failure to follow AAA appointment procedures for arbitrators).

⁹⁰ Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, DISP. RESOL. J., Nov. 2003, at 44.

arbitrators are typically selected and compensated by the employer. Unlike arbitrators, judges are public officials compensated by public funding.⁹¹ The bench trial has other inherent advantages over arbitration. First, the judge is less likely to “split the baby” in his rulings by attempting to find a middle ground to appease both sides.⁹² “Splitting the baby” syndrome is evidenced by studies that find that the awards of arbitrators are, on average, lower than those of judges or juries.⁹³ In addition, a judge, unlike an arbitrator, is not as easily swayed by “repeat performer” syndrome.⁹⁴ Any given employer is much more likely than any given individual employee to have been to arbitration before. Consequently, its past experience with an arbitrator may influence its selection of an arbitrator. An example of repeat performer syndrome can be seen in *Walker v. Ryan’s Family Steakhouses, Inc.*, a case in which the court was concerned that the arbitrator was unable to “provide a ‘neutral’ arbitral service, while simultaneously relying on the continuing satisfaction of its employer-clients for its livelihood.”⁹⁵ Arbitrators who want repeat business may factor this into their decision-making process, and be less likely than a judge to upset an employer who can provide him or her with the potential for future business.⁹⁶ One study found that employees won “with significantly less frequency” when arbitrating against repeat performer employers than when they were facing those employers who had never arbitrated claims before.⁹⁷

⁹¹ See Fink, *supra* note 70.

⁹² See P. Jerome Richey, Resolving Employment Disputes, at <http://library.findlaw.com/1999/sep/1/128092.htm> (last visited Oct. 12, 2005) (discussing the tendency of arbitrators to reach some middle ground to appease both sides, or “split the baby” in the their rulings). When an arbitrator uses the “split the baby” technique, the arbitrator is deciding some issues in favor of the employee and others in favor of the employer.

⁹³ “Arbitration can be seen as a risk management tool. It results in smaller, although more frequent, awards in favor of employees.” Joseph S. Burns, *Predispute Arbitration Agreements in Ohio: An Employer’s Guide to Creating an Enforceable Agreement*, 28 U. DAYTON L. REV. 351, 355 (2003) (citing *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114 (2001)).

⁹⁴ Under the “repeat performer” theory, the employer would select favorite arbitrators repeatedly, and those arbitrators, in order to keep future business and return the favor to the employer, issue biased decisions for the employer. See Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMPLOYEE RTS. & EMP. POL’Y J. 189, 213 (1997); see also *Questions Remain on Safeguarding Access, Due Process Following High Court’s Ruling*, 29 U.S. LAW WEEK, Apr. 10, 2001, at 2609 [hereinafter *Questions Remain*] (“Arbitration is a private form of justice with the cards stacked in favor of repeat players In this situation, the repeat players are employers who force employees into these arrangements.” (quoting the associate general counsel of the American Trial Lawyers Association)).

⁹⁵ *Walker v. Ryan’s Family Steakhouses, Inc.*, 289 F. Supp. 2d 916, 928 (M.D. Tenn. 2003).

⁹⁶ This is particularly true when comparing arbitrators to *federal* judges, who do not have to run for re-election.

⁹⁷ Martin H. Malin, *Privatizing Justice—But By How Much? Questions Gilmer Did Not Answer*, 16 OHIO ST. J. ON DISP. RESOL. 589, 604 (2001) (citing Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMPLOYEE RTS. & EMP. POL’Y J. 189 (1997)).

Furthermore, in a bench trial, as opposed to arbitration, the employee enjoys the ability to appeal the judge's decision in court, whereas an arbitrator's ruling is subject to judicial review only under a very small set of circumstances, even when there is no legal justification for the award.⁹⁸ The ability to be heard in court initially also provides employees better protection against improper investigations performed by employers and shields witnesses from employers under the Federal Rules of Civil Procedure.⁹⁹

Another advantage of a bench trial, both for employees and society in general, is that there is more transparency in the court system because court decisions are made public, while arbitrators' decisions are typically not public.¹⁰⁰ Furthermore, whereas a judge provides detailed analysis and reasoning for the decision he or she renders, the Supreme Court has held that although it is ideal for an arbitrator to write an opinion to substantiate his or her findings, an arbitrator is not *required* to give a reason for the award.¹⁰¹ A final advantage of a bench trial is that more discovery takes place in courts than in arbitration hearings, since the American Arbitration Association's rules permit, but do not compel, discovery.¹⁰² This can aid the employee in gaining access to evidence that would otherwise be difficult to obtain in

⁹⁸ See *First Options of Chicago v. Kaplan*, 514 U.S. 938, 942 (1995); *Wilko v. Swann*, 346 U.S. 427, 436-37 (1953), *overruled on other grounds by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); *United Paperworkers Int'l Union Local 1737 v. Inland Paperboard & Packaging, Inc.*, 25 Fed. App. 316, 318 (6th Cir. 2001) ("[T]he review of an arbitration award is 'one of the narrowest standards of review in all of American jurisprudence.'" (quoting *Tenn. Valley Auth. v. Tenn Valley Trades & Labor Council*, 184 F.3d 510, 514-15 (6th Cir. 1999); *Gas Aggregation Servs. v. Howard Avista Energy*, 319 F.3d 1060, 1064 (8th Cir. 2003); *Schultz*, *supra* note 25).

⁹⁹ See *Fink*, *supra* note 70; see also Fed. R. Civ. P. 11, 26 (involving rules that have the effect of protecting employees from overzealous techniques).

¹⁰⁰ See *Detroit v. Detroit Police Officers Assoc.*, 294 N.W.2d 68, 124 (Mich. 1980); *Questions Remain*, *supra* note 94, at 2609 ("Arbitration is inherently secret with no recording and no public record." (quoting the associate general counsel of the American Trial Lawyers Association)).

¹⁰¹ See *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 598 (1960). The United States Supreme Court stated the following:

Arbitrators have no obligation to the court to give their reasons for an award. To require opinions free of ambiguity may lead arbitrators to play it safe by writing no supporting opinions. This would be undesirable for a well-reasoned opinion tends to engender confidence in the integrity of the process and aids in clarifying the underlying agreement.

Id.

¹⁰² See *Burns*, *supra* note 93, at 379 n. 158 (providing that AAA rules state that an arbitrator shall have the authority to order discovery in a manner "*consistent with the expedited nature of arbitration*." (emphasis added)). But see Martha Neil, *Litigation over Arbitration: Courts Differ on Enforceability of Mandatory Clauses*, 91 A.B.A. J. 50, 51 (2005) ("Arbitration is beginning to look a lot more like litigation There's more discovery. There's more motion practice. There are concepts such as summary judgment that until recent years were foreign to the world of arbitration." (quoting David. A. Hoffman of Boston, chair of the ABA's Dispute Resolution Section)).

arbitration.¹⁰³ Overall, a bench trial offers an employee the opportunity to avoid most of the disadvantages inherent in arbitration, while gaining access to the judicial system with most of its advantages.¹⁰⁴

B. Benefits of Bench Trials to Employers

Bench trials, as opposed to jury trials, present many benefits for employers as well. Judges are less likely to award irrationally inflated damage awards and less likely to be swayed by appeal to emotion.¹⁰⁵ A plaintiff's tearful testimony that "she was humiliated by being escorted from the building by a security guard when her employment was terminated" may have no impact on a judge who realizes that such a procedure is common in these circumstances.¹⁰⁶ Bench trials also benefit employers by reducing the time and cost of the trial—by eliminating the need for jury instructions and the time consumed in jury deliberations.¹⁰⁷

Bench trials also present some advantages over arbitrations. In a bench trial, the employer may be more likely to avoid frivolous claims.¹⁰⁸ Employers are less prone to baseless claims in court, since the barriers to bringing a case are higher in court than in arbitration.¹⁰⁹ Furthermore, since judges, unlike arbitrators, have no financial interests in extending the length of a trial,¹¹⁰ they are more receptive to dispositive motions, such as summary judgment motions.¹¹¹ Arbitrators, on the other hand, have an economic incentive to allow the litigation to proceed as long as possible.¹¹² Thus, in arbitration, an employer may have to continue through the entire proceeding when

¹⁰³ The plaintiff in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) argued that the discovery in arbitration was too limited (when compared to the courts) to allow her to prove her discrimination claim. This may generally be a disadvantage for the employer, who may wish to limit discovery and set its own rules for presenting evidence. See Neil, *supra* note 102, at 50.

¹⁰⁴ See Neil, *supra* note 102, at 52 (providing that consumer advocates groups often dislike arbitration for many of the same reasons).

¹⁰⁵ See Schultz, *supra* note 25.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ See Fink, *supra* note 70.

¹⁰⁹ Burns, *supra* note 93, at 356; see also *Questions Remain*, *supra* note 93, at 2610. ("Employers who do not have a lot of complaints. . . should consider whether instituting an arbitration program might encourage employees to file claims.").

¹¹⁰ Eistreich & Johnson, *supra* note 32, at 3. By contrast, a judge may actually have an interest in making the trial as short and efficient as possible, given the size of the average docket. But see Neil, *supra* note 102, (stating that summary judgment motions are now available for use in arbitration).

¹¹¹ See Ayres, *supra* note 76 ("Ironically, some courts believe that the summary judgment process takes more time than simply denying summary judgment and proceeding to trial [I]n most cases, though . . . that perception is becoming less and less accurate.").

¹¹² Samuel M. Ventola, *Forget Arbitration—Jury Trial Waivers Might be a Better Answer for Employment Agreements*, at <http://rothgerber.com/newsletters/articles/le0025.asp> (last visited October 12, 2005).

it may have won on summary judgment in a bench trial. Another advantage of bench trials is that judges are more open to technical arguments than are arbitrators who are more used to “hearing the merits” of a dispute and are less receptive to legal and technical arguments.¹¹³ In short, bench trials may be more advantageous to employers as compared to both jury trials and arbitration.

C. Benefits of a Bench Trial to Both Employee and Employer

The benefits of a bench trial to both employees and employers include a trial that is, in most cases, both less costly and less time consuming than either a jury trial or arbitration.¹¹⁴ For example, according to one study, jury trials, on average, lasted 4.3 days, compared to only 1.9 days for bench trials. In addition, the time between the filing of a case and its ultimate disposition was shorter in bench trials than in jury trials.¹¹⁵ While arbitration used to be faster, it now takes about one year, on average, to receive a final decision from an arbitrator for a union employee.¹¹⁶

Another benefit to both parties is the fact that decisions of a court can be appealed more easily than decisions of an arbitrator.¹¹⁷ The standard of review for arbitration decisions gives deference to the arbitrator, with judicial intervention possible only in cases of fraud, corruption, or where an arbitrator exceeds his or her authority.¹¹⁸ Most courts have reviewed employment arbitration awards only upon a showing of “manifest disregard for the law.”¹¹⁹ Even when an arbitrator’s award is

¹¹³ See Richey, *supra* note 92.

¹¹⁴ The validity of arbitration agreements may depend on whether the employee was afforded “court-like procedures” before and during the hearing. See Fink, *supra* note 70. When court-like procedures are afforded, arbitrations become more lengthy and costly.

¹¹⁵ See Schultz, *supra* note 24. During 2001, 78% of bench trials were disposed of within 24 months of filing—compared to only 57% of jury trials. *Id.* See also Paul Carrington, *The Civil Jury and American Democracy*, 13 DUKE J. COMP. & INT’L L. 79, 90 (2003) (stating that the jury trial takes about 50% longer than a bench trial due to several factors, including more people in the courtroom, evidence presented fewer hours a day with more breaks, and evidence that must be more fully explained).

¹¹⁶ Reginald Alleyne, *Statutory Discrimination Claims: Rights “Waived” and Lost in the Arbitration Forum*, 13 HOFSTRA LAB. L.J. 381, 399 (containing a break-down of the arbitration time line).

¹¹⁷ See Fink, *supra* note 70; *Sawtelle v. Waddell & Reed Inc.*, 754 N.Y.S. 2d 264 (N.Y. App. Div., 2003). But see David Hechler, *Arbitration Not Such a Sure Thing?*, THE NAT’L L. J., May 3, 2004, at 10. While it is still true that arbitrators’ awards are rarely overturned, there has been an increasing tendency of courts to look at arbitrators’ rulings. *Id.*

¹¹⁸ Christina Fahrbach, *From Gardner to Circuit City: Mandatory Arbitration of Statutory Employment Disputes Continues*, DISP. RESOL. J., Nov. 2001, at 65, 74. The FAA allows courts to vacate the award when: (1) there are instances of corruption or fraud, (2) there was evident partiality or corruption in the arbitrations, (3) the arbitrators were guilty of misconduct by refusing to postpone the hearing or refusing to hear evidence pertinent to the controversy, or (4) the arbitrator exceeded her power so that a mutual, final award was not made. 9 U.S.C. § 10 (2002); see also *Crowell v. Downey Cmty. Hosp. Found.*, 115 Cal. App. 4th 730, 738 (Cal. Ct. App. 2002) (stating that the FAA allows a court to vacate or modify an arbitration award if it is completely irrational).

¹¹⁹ See Malin *supra* note 69, at 812.

taken to court, the award is usually confirmed.¹²⁰ It is far easier to get a judge's ruling reversed if the judge fails to follow the law than it is to get an arbitrator's decision reversed on the same ground.¹²¹ The infrequency of review of an arbitrator's decision is further complicated by opinions of some courts that arbitrators may not be "sufficiently versed in the law."¹²² The bench trial, of course, does not share in these deficiencies.

D. Costs¹²³

Jury trial waivers "offer at least the potential of somewhat less costly and complicated litigation in the event of a dispute, when compared to arbitration and jury trials."¹²⁴ The up-front cost of litigation to the employee is often minimal due to contingency fee agreements in which counsel defers collection of fees until judgment.¹²⁵ "Conversely, a plaintiff forced to arbitrate a typical \$60,000 employment discrimination claim will incur costs . . . that range from three to nearly fifty times the basic costs of litigating in a judicial, rather than arbitral forum."¹²⁶

¹²⁰ See LeRoy & Feuille, *supra* note 22, at 50–51. In one study, approximately 70–71% of challenged awards in arbitration cases were confirmed. *Id.* Within employment cases, approximately 80–85 % of awards were confirmed. *Id.* at 56.

¹²¹ See Ventola, *supra* note 112 ("If the judge does fail to follow the law, it is possible to get the judgment reversed on appeal (which tends to keep trial judges closer to the law in the first place).").

¹²² Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1048–49 (1996) (quoting *Wilko v. Swan*, 346 U.S. 427 (1953) and *McDonald v. City of West Branch*, 466 U.S. 284, 288–93 (1984) ("[A]n arbitrator's expertise 'pertains primarily to the law of the shop, not the law of the land.'").

¹²³ This section assumes that the costs of arbitration may be split between employee and employer. Case law on this topic is undecided, as some courts have ruled that cost splitting provisions are unconscionable while others have upheld arbitration agreements that contain cost splitting provisions. See *Faber v. Menard, Inc.*, 367 F.3d 1048, 1053 (8th Cir. 2004) ("[W]e agree with the majority of circuits that a fee-shifting provision by itself does not make an arbitration agreement unenforceable."). But see *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 555 (4th Cir. 2001) (providing that a cost splitting provision can be unenforceable if arbitration costs are so expensive that they deter the employee from using the arbitral forum); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 65 (D.C. Cir. 1997) (disapproving of fee-splitting clauses). For a complete discussion on fee allocation, see Steen, *supra* note 33. One study by the U.S. General Accounting Office found that "typically, the policies provided for equal sharing in payment of the arbitrator." See Grodin, *supra* note 89, at n.8.

¹²⁴ *Connecticut Nat'l Bank v. Smith*, 826 F. Supp. 57, 59 (D. R.I. 1993).

¹²⁵ *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 664 (6th Cir. 2003).

¹²⁶ *Id.* at 669. Although the range is large, the point remains that arbitration is a more costly route to the employee/plaintiff. But see William Howard, *Arbitrating Claims of Employment Discrimination*, DISP. RESOL. J., Oct. 1995, at 44. Lawyers often require provable damages of \$60,000–\$65,000, and retainers of \$3,000–\$3,600, plus a 35% contingency. *Id.* Since damages are often highly correlated to an employee's compensation, higher paid employees naturally meet these requirements easier, and thus have easier access to a plaintiff's attorney in these circumstances. *Id.* "In 1994, the Commission on the Future of

“Furthermore, because Title VII allows compensatory damage awards up to \$300,000, the costs of arbitrating such a claim will range ‘higher and higher.’”¹²⁷ Arbitrators typically charge hundreds of dollars per hour, with minimums per day usually in the thousands of dollars, while judges are essentially free.¹²⁸ One court stated that “the analysis of likely arbitration costs must consider only ‘up-front’ costs, not the lower cost that may ultimately result if the arbitrator relieves the employee costs presumptively imposed by AAA rules. . . . [since] it is the out-of-pocket costs an employee considers when deciding whether he can afford arbitration.”¹²⁹ One study found that forum fees for arbitration may be as much as 5,000% higher than forum fees in courts.¹³⁰ This can cause a problem for employees who cannot afford the potential arbitration costs, and at the same time, have trouble determining or proving what those costs would actually be.¹³¹ Employees may worry

Worker-Management Relations, better known as the Dunlop Commission, reported that most employment discrimination cases are brought by managers and professionals, rather than lower-level workers.” See Eisenberg & Hill, *supra* note 90, at 47.

¹²⁷ *Cooper v. MRM Inv. Co.*, 367 F.3d 493, 511 (6th Cir. 2004).

¹²⁸ *Compare Spinetti v. Serv. Corp. Int’l*, 324 F.3d 212 (3d Cir. 2003) (stating that a mid-range arbitrator in Western Pennsylvania costs \$250 per hour with a \$2,000 per day minimum) with *Cooper v. MRM Inv. Co.*, 199 F. Supp. 2d 771, 782 n.11 (M.D. Tenn. 2002) (“Other than paying her taxes, Plaintiff is not required to pay part of my salary as a federal judge.”), *rev’d*, 367 F.3d at 493; see also Reinharz & O’Neil, *supra* note 77 (stating that arbitrators’ fees often exceed \$1,000 per day, while in a bench trial there judge hears the case at no cost to the parties); *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465, 1481 n.8 (D.C. Cir. 1997) (providing that arbitrators’ fees can be \$250-\$350 per hour and fifteen to forty hours of arbitrator time for employment cases, totaling \$3,750 to \$14,000 per case).

¹²⁹ *Cooper*, 367 F.3d at 511 (quoting *Morrison*, 317 F.3d at 664). It is interesting that this approach does not take into account the actual, but only the potential costs, as though looking at a single “snapshot” moment in time, when the party is making their decision of potential judicial forum versus potential arbitral forum. This essentially makes the analysis of the cost of trial free because of the risk factor. The plaintiff has almost no risk if counsel takes the case on a contingency basis, even though if a plaintiff wins, it technically limits their “upside” of recovery when fees eventually have to be paid. In the arbitration setting, the plaintiff has all of the risk if there is a cost sharing agreement, or if there is no mention of costs. *But see Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 92 (2000). “The *Green Tree* court’s reasoning supports an examination of the *actual* effect of a fee-splitting provision on the plaintiff’s ability to pursue . . . claims, particularly in light of the fact that total litigation expenses frequently far exceed the cost of litigation.” *Garcia v. Wayne Homes, L.L.C.*, No. 2001 CA 53, 2002 Ohio App. Lexis 1917, *47 (2nd App. Dist. Apr. 19, 2002).

¹³⁰ See Public Citizen, *The Costs of Arbitration*, at <http://www.citizen.org/publication/release.cfm?ID=7173&secID=1052&catID=126> (last visited Oct. 13, 2005). “Public Citizen’s survey of costs finds that, for example, the forum fee for a \$60,000 employment discrimination claim in the Circuit Court of Cook County, Illinois is \$221.” *Id.* “The forum fees for the same claim before the National Arbitration Forum (NAF) would be \$10,952, or \$4,943 higher.” *Id.* “The American Arbitration Association (AAA) would charge up to \$6,650 for an \$80,000 claim.” *Id.*

¹³¹ *Id.* The Supreme Court adopted an approach to determine whether an arbitration agreement’s cost splitting provision denies litigants an opportunity to arbitrate, based on the arbitration being too costly. “[W]here . . . a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of

that, if the contract so allows, an arbitrator will allocate significant costs to them.¹³² While it is true that an employee may avoid an arbitration agreement if the cost is too high, the burden lies on the employee to prove costs.¹³³ If an employer is paying for most or all of the arbitration costs, that presents another problem for the employee because it places the arbitrator in a situation of apparent bias towards the hand that is feeds him or her.¹³⁴

Arbitration also imposes extra administrative-type costs on claimants which would not be charged had the case been brought to court. Such costs include fees for subpoenas, discovery requests, and continuances.¹³⁵ Finally, the space to conduct the arbitration hearing must be available or rented at a charge, thus increasing the aggregate total of the claim, regardless of whether the employer or employee pays.¹³⁶

VI. OTHER RIGHTS AN EMPLOYEE CAN WAIVE

As previously discussed, there is little direction from the Sixth Circuit regarding jury trial waivers outside of arbitration in the employment context. To determine the likelihood of the Sixth Circuit's enforcement of these waivers, this section will consider the Sixth Circuit's approach to waivers of rights other than the right to a jury trial by employees in contractual employment agreements.

Employees may waive several other rights in addition to the Seventh Amendment right to a jury trial. For example, employees can waive their statutorily provided limitations period for filing a cause of action by contractual alteration of it.¹³⁷ In

showing the likelihood of incurring such costs." *Green Tree Fin. Corp.*, 531 U.S. at 92 (finding that because defendant was unable to prove the costs of arbitration, as the arbitration agreement was silent as to the costs of arbitration, the defendant was unable to invalidate the arbitration agreement). It is also worthy of mention that the costs of arbitration discussed above are an incentive for the employer to use an arbitration clause. The high costs of arbitration may discourage employees from pursuing claims that they otherwise would bring in court where the costs are not as prohibitive.

¹³² See Steen, *supra* note 34, at 182.

¹³³ See *Green Tree Fin. Corp.*, 531 U.S. at 79. One commentator believes that *Green Tree* will be more influential in the long run than *Circuit City* because of the burden shifting to the employee to prove that the costs impede their access to arbitration. See Malin, *supra* note 69, at 792-93.

¹³⁴ See Alleyne, *supra* note 116, at 410 ("An arbitrator compensated wholly or mainly by the employer will convey the appearance of possible bias in favor of the party who pays the arbitrator's fees or wages.").

¹³⁵ The National Arbitration Forum, for example, charges \$75 for a subpoena, \$150 for a discovery request, and \$100 for a continuance, which are all free in court. Simon J. Nadel, *Mandatory Arbitration Not For All Employers; Cost, Fairness Still Subject of Debate*, U.S. LAW WEEK, June 4, 2002, at 2755.

¹³⁶ Reinharz & O'Neil, *supra* note 77.

¹³⁷ Some litigators argue that this is not actually waiving a right since the clause is only shortening a time period. Three states have statutes authorizing the shortening of limitations periods by contract (Arizona, New York, and Pennsylvania), while twelve states prohibit the shortening of statutes of limitation by contract (Alabama, Florida, Idaho, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Oklahoma, South Carolina, and South Dakota). Bureau Nat'l Aff., Inc., *Focus on Limitations Period*, Apr. 3, 2001, at 28.

Thurman v. Daimler Chrysler, the Sixth Circuit found that the employee had knowingly and voluntarily waived a statutory period of limitation.¹³⁸ The court enforced the abbreviated limitations period of six months to which the employee had agreed. She was thus barred from bringing a sexual harassment suit that she initiated after the six month time period.¹³⁹ The court reasoned that because the statute of limitations is not one of the “mandatory” items that must be included in a collective bargaining agreement, the employees had the ability to agree to an abbreviated time period.¹⁴⁰

Another right that employees may waive is the right to work for a competing employer after leaving a job. Courts, including in the Sixth Circuit, frequently uphold non-compete agreements.¹⁴¹ The Ohio Supreme Court has also “long recognized the validity of non-compete agreements between an employer and ex-employee.”¹⁴² The ability to waive one’s right to gainful employment dates back to the 18th century, in the case of *Mitchel v. Reynolds*.¹⁴³ In *Mitchel*, the plaintiff agreed to cease his employment as a baker, or pay the defendant fifty pounds. The plaintiff sued when the defendant resumed his occupation. The defendant argued that enforcement would be a restraint on his ability to earn a livelihood, but the

¹³⁸ *Thurman v. DaimlerChrysler, Inc.*, 397 F.3d 352, 358 (6th Cir. 2004). Because *Thurman* involved the plaintiff’s civil rights, the court noted that the plaintiff’s waiver “must be carefully scrutinized for voluntariness.” *Id.* (citations omitted). Even under this heightened level of scrutiny, the court concluded that the waiver of the normal statutory period of limitation was knowing and voluntary according to the standards of contract law. *Id.*; see also *Myers v. W.S. Life Ins. Co.*, 849 F.2d 259, 260 (6th Cir. 1998) (upholding a reduced contractual time limitation as long as it is “reasonable”); *Morrison v. Circuit City Stores, Inc.*, 70 F. Supp. 2d 815, 827 (D. Ohio 1999) (upholding a one year limit to initiate arbitration despite the fact that this was less time than required under Title VII).

¹³⁹ *Thurman*, 397 F.3d at 358; see also *Myers*, 849 F.2d at 259 (holding that the employee contractually waived the statute of limitations when agreeing to a six month time limit from time of termination to bring suit).

¹⁴⁰ *Myers*, 849 F.2d at 259 (citing *Detroit Police Officers v. Detroit*, 214 N.W. 2d 803, 808-09 (Mich. 1974)).

¹⁴¹ See *Basic Computer Corp. v. Scott*, 973 F.2d 507, 513 (6th Cir. 1992) (affirming the issuance of a preliminary injunction against former employees prohibiting them from working for a competitor); *Ticor Title Ins. Co. v. Cohen*, 173 F.3d 63, 73 (2d Cir. 1999) (stating that covenants not to compete are “not per se void and may, if fairly and reasonably drawn, be enforced by injunction”); *Lowry Computer Prods., Inc. v. Head*, 984 F. Supp. 1111, 1117 (E.D. Mich. 1997) (granting an injunction preventing an employee from competing for one year). See also Richard Mann, *Starting From Scratch: A Lawyer’s Guide to Representing a Start-Up Company*, 56 Ark. L. Rev. 773, 814 (2004). “Non-compete agreements are usually enforceable so long as they are: 1) based upon valid consideration; 2) necessary to protect the company’s interests; and 3) reasonable in geographic scope and duration.” *Id.*

¹⁴² *Defiance Hosp., Inc. v. Fauster-Cameron, Inc.*, 344 F. Supp. 2d 1097, 1118 (Ohio 2004) (citing *Lake Land Employment Group, LLC v. Columer*, 804 N.E.2d 27 (Ohio 2004) (citing to *Briggs v. Butler*, 45 N.E. 2d 757 (Ohio 1942)). “Such an agreement does not violate public policy if it is ‘reasonably necessary for protection of the employer’s business, and not unreasonably restrictive upon the rights of the employee.’” *Id.* at 757.

¹⁴³ *Mitchel v. Reynolds*, 1 P. Wms. 181, 24 Eng. Rep. 347 (1711).

Queens bench held that the restraint was not void. The court stated that “a man may, upon a valuable consideration, by his own consent . . . give over his trade.”¹⁴⁴

More recently, many courts in the United States have upheld contracts that contain non-compete clauses.¹⁴⁵ In *Ticor Title Insurance v. Cohen*, for example, the court upheld a permanent injunction against two employees who had signed non-compete clauses.¹⁴⁶ These cases illustrate that courts allow employees to give up the right to other employment, which is arguably just as important as the right to a jury trial. Indeed, it would not be unreasonable to believe that many employees in the general work force would value the right to seek other employment outside of their current job over the right to a jury trial.

Furthermore, employees can waive their rights to the protection of the Age Discrimination in Employment Act (ADEA), so long as the waiver complies with the Older Workers’ Benefit Protection Act (OWBPA) rules.¹⁴⁷ Employees may also waive their access to the judicial forum in an ADEA claim in the employment context where the waiver is knowing and voluntary.¹⁴⁸

Employees also frequently waive their right to privacy by signing or agreeing to handbooks that require them to forfeit some privacy rights.¹⁴⁹ Although the right to privacy is not expressly mentioned in the Constitution, and is thus arguably not as important as the right to a jury trial, the Supreme Court has held that the Bill of Rights implies a right to privacy in some instances.¹⁵⁰ Therefore, the act of waiving the right to privacy may be placed in the same category as the act of waiving the right to a jury trial. The right to privacy in the workplace may be diminished by drug testing, submitting to a physical, monitoring of phone calls or emails, or installation of cameras in the workplace.¹⁵¹ In *Gillespie v. Dallas Housing Authority*, the plaintiff refused to sign a form that essentially required employees to waive the right to assert an invasion of privacy claim.¹⁵² The court granted a motion for summary

¹⁴⁴ *Id.* at 186.

¹⁴⁵ See *Basic Computer Corp.*, 973 F.2d at 507; *Ticor Title Ins.Co.*, 173 F.3d at 63.

¹⁴⁶ See 173 F.3d at 63.

¹⁴⁷ *Oubre v. Energy Operations, Inc.*, 522 U.S. 422 (1998). An employee signed a release of all claims against her employer. *Id.* The Court determined that the employee’s release could not bar the employee’s claims because it was not in compliance with the requirements of OWBPA. *Id.* at 427-28. Thus, if the agreement *was* in compliance, it may have been upheld.

¹⁴⁸ See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991).

¹⁴⁹ See *Gillespie v. Dallas Hous. Auth.*, CA 3:01-CV-895-R, 2003 U.S. Dist. LEXIS 29, at *5-6 (N.D. Tex. Jan 3, 2003) (granting defendant employer’s motion for summary judgment where employer discharged employee for refusing to sign employee handbook waiving her right to privacy in the workplace).

¹⁵⁰ *Griswold v. Connecticut*, 381 U.S. 479 (1965). (quoting, “[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees Various guarantees create zones of privacy.”). *Id.* at 484.

¹⁵¹ See *Jonathan v. Holtzman, Drug Testing in the Workplace: Applicant Testing for Drug Use: A Policy and Legal Inquiry*, 33 WM & MARY L. REV. 47, 52 (1991).

¹⁵² See *Gillespie*, 2003 U.S. Dist. LEXIS 29 at *5, *23.

judgment to the employer on the employee's complaint that the defendant had installed a camera in the common hallway, aimed at her desk.¹⁵³

Arguably, if employees are able to waive statutory time limitations, the right to seek gainful employment somewhere else, the right to sue under the ADEA, and the right to privacy, employees ought to be able to contract around their right to a jury trial, as long as the waiver is conspicuous. Employees have the same business acumen, the same ability to negotiate, and the same bargaining power whether they are waiving their right to privacy, statutory limitations, or a jury trial. While some of these rights are more fundamental than others, the right to privacy and the right to earn a living are arguably at least as important as the right to a jury trial.¹⁵⁴ If employees have the right to bargain these away, they should certainly have the right to voluntarily and knowingly waive their right to a jury trial.

VII. RIGHT TO WAIVE A JURY TRIAL OUTSIDE OF THE EMPLOYMENT CONTEXT

Even if the rights to privacy and gainful employment are considered less fundamental than the right to a jury trial, since they are not mentioned in the Constitution, contractual jury trial waivers have been upheld in areas outside of the employment context. While such waivers may be upheld, they are subject to considerable judicial scrutiny since they result in the loss of a constitutional right.¹⁵⁵ Contract provisions waiving the right to a jury trial are common and have been upheld in consumer-oriented transactions such as loan agreements,¹⁵⁶ retail sales contracts,¹⁵⁷ landlord-tenant leases,¹⁵⁸ and commercial leases.¹⁵⁹ Jury waivers have also been upheld in manufacturing agreements.¹⁶⁰ The waivers in these situations are analogous to waivers in the employment context. In *Birch v. Al Castrucci*, the Second District Court of Appeals of Ohio upheld a jury waiver in a retail sales

¹⁵³ *Id.* at 22.

¹⁵⁴ One argument to the contrary is that the right to earn a living is not completely waived. In non-competes, the employee can still earn a living, just not by working for a competitor. Also, the non-compete agreement must be for a reasonable amount of time. Typically, one year or less is acceptable. See generally *Lowry Computer Prods, Inc. v. Head*, 984 F. Supp. 1111 (E.D. Mich. 1997).

¹⁵⁵ *Eistreich & Johnson*, *supra* note 32. See also *H.R. Graphics v. Lake-Perry*, No. 70696, 1997 Ohio App. LEXIS 324, at *10 (Ohio Ct. App. Jan 30, 1997) (citing *S&S, Inc. v. Kuret*, No. 62478, 63042, 1993 Ohio App. LEXIS 2442 (Ohio Ct. App. May 13, 1963)).

¹⁵⁶ *In re S. Indus. Mech. Corp.*, 266 B.R. 827 (W.D. Tenn. 2001) (enforcing pre-dispute jury waiver in a promissory note for the purchase of real property).

¹⁵⁷ *Birch v. Al Castrucci, Inc. II*, No. CA 15123, 1995 Ohio App. LEXIS 3227, at *12 (Ohio Ct. App. Aug. 2, 1995).

¹⁵⁸ See, e.g., *Mentor Lagoons, Inc. v. Geldart*, No. 6-265, 1979 Ohio App. LEXIS 8938 (Ohio Ct. App. 1979) (landlord-tenant lease agreement); *Union Commerce Bank v. Kimbo*, 162 N.E.2d 926 (Ohio. Mun. Ct., Cuyahoga Cty. 1959) (landlord-tenant lease agreement).

¹⁵⁹ See *Leasing Serv. Corp. v. Crane*, 804 F.2d 828 (4th Cir. 1986) (enforcing a jury waiver in the commercial lease context).

¹⁶⁰ See generally *N. Feldman & Son, Ltd. v. Checker Motors Corp.*, 572 F. Supp. 310 (S.D.N.Y. 1983). However, note that the two parties here were on a more level playing field in terms of business acumen and ability to negotiate the terms of the contract.

contract.¹⁶¹ The *Birch* court stated that “certainly if the waiver of both a jury and court trial is not found offensive, the waiver of only a jury could hardly be deemed offensive” when referring to other retail sales contracts which involved not just a waiver of trial by jury, but also a waiver of a trial by a court.¹⁶² This line of reasoning is extremely important to the case for an employee’s ability to waive a jury trial in the employment context. It can be used to make the connection between arbitration and the simple waiver of a jury trial in the employment context. Arbitration is essentially a waiver of both a trial by jury and a trial by a court. If both can be waived, then one may use the *Birch* court’s argument that “certainly . . . the waiver of *only* a jury could hardly be deemed offensive” in employment contracts.¹⁶³

The Supreme Court of Connecticut, in *L&R Realty v. Connecticut National Bank*, came to the same conclusion regarding a jury waiver in a loan agreement.¹⁶⁴ The court first found that jury trial waivers are neither against public policy nor unenforceable.¹⁶⁵ The court went on to recognize that “jury trial waivers entered into in advance of litigation are similar to arbitration agreements in that both involve the relinquishment of the right to have a jury decide the facts of the case.”¹⁶⁶ The court favored arbitration because it was intended to avoid the formalities, delay, expense, and vexation of ordinary litigation.¹⁶⁷ In comparing arbitration to jury waivers, the court stated that “arbitration agreements illustrate the strong public policy favoring freedom of contract and the efficient resolution of disputes. These same policies of freedom of contract and efficiency are furthered by a jury trial waiver clause.”¹⁶⁸ Thus, the court recognized that a jury trial waiver actually advances the same goals as a mandatory arbitration clause. As discussed in Part V, however, jury waivers do so without some of the disadvantages of arbitration.

Given that jury trial waivers have been upheld in all of these non-employment settings, it is not difficult to imagine waivers being upheld in the employment context. In fact, many employees arguably have more bargaining power than a typical consumer. The average credit card customer or lessee of an apartment is probably equally as likely as a potential employee to be in a position to bargain with a prospective employer.

Some courts have even gone so far as to recognize that arbitration “involves a *greater* compromise of procedural protections than does the waiver of the right to

¹⁶¹ *Birch v. Al Castrucci, Inc.* II, No. CA 15123, 1995 Ohio App. LEXIS 3227, *12 (Ohio Ct. App. Aug. 2, 1995).

¹⁶² *Id.*

¹⁶³ *Id.* (emphasis added).

¹⁶⁴ *L & R Realty v. Conn. Nat’l Bank*, 715 A.2d 748, 753 (Conn. 1998).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*; see also *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983).

trial by jury.”¹⁶⁹ Although the Tenth Circuit was applying this statement in the context of fraud invalidating jury waiver provisions in a case involving a commercial lease, the statement is important in understanding the reasoning behind enforcement of jury waivers outside of arbitration.¹⁷⁰ First, it is a logical statement because arbitration involves not only the forfeiture of the right to a jury, but also the forfeiture of the right to be heard in the judicial forum. Second, if arbitration involves a *greater* compromise of protections than a waiver of the right to a trial by jury outside of the employment context, then courts should be at least as open to jury trial waivers in employment contracts as they are to arbitration clauses.

VIII. JURY WAIVERS IN THE EMPLOYMENT CONTEXT, OUTSIDE OF ARBITRATION

The remainder of this Note focuses on the right to waive a jury trial in employment matters, independent of an arbitration agreement. This is a relatively novel concept and one not decided to date in the Sixth Circuit. There is little authority in the employment context regarding the enforceability of jury trial waivers that are not part of arbitration agreements under the FAA.¹⁷¹ One of the main arguments against the ability to contract around a jury trial is the public policy argument discussed in Part IV.¹⁷² However, if mandatory arbitration, which deprives an individual of his or her right to a trial by jury, does not violate public policy, why should waivers of *only* the jury trial violate public policy? There are several cases outside the Sixth Circuit that directly illustrate jury waiver provisions in an employment context.

The first is *Beach v. Burns International Security Services*, in which the Superior Court of Pennsylvania confronted the above question.¹⁷³ Beach had received a packet at orientation, which representatives of Burns told him he had to sign to remain employed. The forms included a waiver of the right to a jury trial. The court held that a waiver of a jury trial in favor of a bench trial does not violate the public policy of Pennsylvania.¹⁷⁴ In upholding summary judgment against Beach, the court agreed with the trial court that “if the parties are free to completely waive their right to a trial in favor of arbitration, then surely they must be allowed to waive only the right of a trial by jury in favor of an expedited and less costly proceeding before a judge.”¹⁷⁵ This decision is not only aligned with the reasoning of the *Birch* and *L&R*

¹⁶⁹ *Telum, Inc. v. E.F. Hutton Credit Corp.*, 859 F.2d 835, 838 (10th Cir. 1988) (citing *Hart v. Orion Ins. Co.*, 453 F.2d 1358, 1361 (10th Cir. 1971)).

¹⁷⁰ *Id.* (holding that general allegations of fraud are not sufficient to invalidate a jury waiver provision).

¹⁷¹ *Eistreich & Johnson*, *supra* note 32; *see Schultz*, *supra* note 25, at 97.

¹⁷² *See supra* Part IV (discussing the strong public policy in favor of arbitration agreements).

¹⁷³ *Beach v. Burns Int’l Sec. Servs.*, 593 A.2d 1285, 1288 (Pa. Super. Ct. 1991).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* This theory was originally postulated by the trial court. The appellate court is affirming the trial court’s language.

Realty courts, it is directly applicable since it deals with a jury trial waiver *in the employment context*.¹⁷⁶

In *Manderson v. Gore*, the jury waiver provision in an agreement between business partners did not violate the public policy of the state of Georgia.¹⁷⁷ The court made notice that “the bargaining position of the parties was equal” and “the claim for which jury trial is being waived directly related to and arises out of the terms and provisions of the overall agreements containing the jury waiver provisions.”¹⁷⁸ It must be noted, however, that the agreement was unlike most employment agreements, as the business partners were on a more equal playing field in terms of business acumen and ability to negotiate than are most prospective employees.¹⁷⁹

Another case that supports upholding a jury trial waiver in the employment context is *Brown v. Cushman & Wakefield*, in which the district court upheld a jury waiver that applied to any action arising out of the employment agreement.¹⁸⁰ When the plaintiff brought suit for termination due to her pregnancy, the court enforced the jury waiver. In doing so, it cited the plaintiff’s Harvard M.B.A. and investment banking experience and stated that the plaintiff could “have negotiated around the clause if she tried.”¹⁸¹ The court applied the four factors, identified in Part III above, to determine that the plaintiff made the waiver in a knowing and voluntary manner.¹⁸² The plaintiff’s qualifications, in *Brown*, present a small problem when arguing for the broad enforcement of jury waiver clauses since the court expressly relied on the plaintiff’s education and past experience.¹⁸³ After all, the average employee will not possess this level of expertise to aid her in the negotiating process. However, one can certainly argue that a Harvard M.B.A. is not necessary to enable one to read and understand an employment contract. To this author’s knowledge, no court has specifically required that a plaintiff possess such an education. Certainly, in those cases falling outside the employment context, courts have not required that the plaintiff have anything comparable to a Harvard M.B.A.¹⁸⁴

Another case that supports the enforceability of jury trial waivers in the employment context is *Hammaker v. Brown and Brown, Inc.*¹⁸⁵ In *Hammaker*, the court declined to enforce the jury trial waiver because it did not comply with the

¹⁷⁶ *Id.*

¹⁷⁷ *Manderson & Assocs. v. Gore*, 389 S.E.2d 251, 257–58 (Ga. Ct. App. 1989).

¹⁷⁸ *Id.* at 258. (quoting *Mall, Inc. v. Robbins*, 412 So.2d 1197, 1199–1200 (Ala. 1982).

¹⁷⁹ *See Mall, Inc.*, 412 So.2d at 1199.

¹⁸⁰ *Brown v. Cushman & Wakefield, Inc.*, 235 F. Supp. 2d 291 (S.D.N.Y. 2002).

¹⁸¹ *Id.* at 293–94. *But see* *Grafton Partners LP v. Superior Court*, 115 Cal. App. 4th 700, 711 (Cal. Ct. App. 2004). (holding that pre-dispute jury trial waivers were both invalid and unenforceable under the California Constitution and Section 6331 of the California Code of Civil Procedure).

¹⁸² *Brown*, 235 F. Supp. 2d 291.

¹⁸³ *Id.*

¹⁸⁴ *See supra* notes and accompanying text in Part III.

¹⁸⁵ *Hammaker v. Brown & Brown, Inc.*, 214 F. Supp. 2d 575 (E.D. Va. 2002).

OWBPA requirements for ADEA claims.¹⁸⁶ However, this left open the implicit assumption that, had the terms of the contract been drafted to comply with the OWBPA, the contract may have been enforced.

Given these examples, a jury trial waiver should be acceptable in a contract for employment so long as it meets all of the stated requirements in Part III. Since employees in most cases will be found to be at some disadvantage with respect to at least the business sophistication and opportunity to negotiate factors previously discussed, employers should take steps to make the waiver as conspicuous as possible. This should include formatting the waiver into its own paragraph, titling it “jury trial waiver,” and using distinguishing typeface.¹⁸⁷ The employee should be given as much bargaining power as possible to negotiate the jury trial waiver. If the employee is able to bargain for another item in the contract in exchange for the jury waiver, it would show that he at least had the opportunity to negotiate.

The Supreme Court has stated that arbitration does not eliminate any substantive rights.¹⁸⁸ Because courts have established that the right to a jury trial is forfeited in arbitration, it seems logical that the main difference between arbitration and bench trials is that in bench trials, employees are still able to have their cases heard in the judicial forum.¹⁸⁹ This should serve as a positive factor in favor of the enforceability of jury trial waivers.

At least one other commentator has compared jury trial waivers to arbitration agreements and asked why jury trial waivers are not given the same weight as arbitration agreements.¹⁹⁰ Although the article was about franchise agreements, the same comparison between jury trial waivers and arbitration agreements can be made in the employment context.¹⁹¹ One way to explain why arbitration clauses may be favored over stand-alone jury waivers is to consider the advantages of arbitration to the court system. Arbitration relieves the courts of a substantial number of cases, thereby lightening dockets. A jury trial waiver, on the other hand, may still result in

¹⁸⁶ OWBPA specifically requires including advising an employee to consult with his attorney and providing for a seven-day revocation period. See 29 U.S.C. § 626(f)(1) (2002).

¹⁸⁷ Alan D. Wingfield, *A Jury Trial Waiver is an Alternative to Alternative Dispute Resolution*, VA. B. ASS'N NEWS J., Sept. 2004 15, 17-18 (citing factors relied upon in *Hitachi Credit v. Signet Bank*, No. 3:96CV815, 1997 U.S. Dist. LEXIS 21499, at *29 (E.D. Va. May 12, 1997), to uphold a jury trial waiver).

¹⁸⁸ “By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.” *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

¹⁸⁹ See *id.*

¹⁹⁰ “As a theoretical matter, the elevated status of arbitration agreements is difficult to justify. This is not to suggest that arbitration clauses should be enforced less rigorously The question, instead, is why judicial forum selection clauses, jury trial waivers, and damage caps in franchise and other business contracts should not be upheld with the same regularity as agreements to arbitrate.” Edward W. Dunham, *Enforcing Contract Terms Designed to Manage Franchisor Risk*, 19 FRANCHISE L.J. 91, 98-99 (2000).

¹⁹¹ This author concedes that the average employee probably has less bargaining power and business sophistication than the average franchisee, who may have many past dealings with franchisors, and at least has the financial means necessary to be entering into an agreement to purchase a franchise.

a bench trial.¹⁹² While it is doubtful that this will ever be a stated reason by courts or official commentary, practically speaking, it is the only logical way to justify the difference in treatment between arbitration and stand-alone jury waivers. However, public policy should dictate that courts do what is right for the parties to a case, not what is desirable for courts in terms of easing case loads.

Another commentator has been vocal in her opposition to mandatory arbitration agreements which do not use appropriate jury waiver standards to determine if arbitration agreements are enforceable.¹⁹³ She cites the “circular” nature of courts’ reasoning that “because persons who accept arbitration obviously choose a forum in which no jury trial is available, no jury trial waiver analysis needs to be performed.”¹⁹⁴ She goes on to say, in disputing another commentator:

The only intellectually honest way to defend many federal courts’ refusal to apply a heightened jury trial waiver standard to arbitration is to argue that reliance on civil jury trial waiver standards should be abandoned not only in reviewing arbitration clauses but in all other contexts as well Indeed some lawyers have now urged companies to use a plain jury trial waiver, rather than an arbitration clause, to gain the advantages of the waiver without . . . the disadvantages of arbitration Fortunately, it does not seem likely that most courts are ready to allow persons to waive their jury trial rights involuntarily, non-intelligently, or non-knowingly in all contexts.¹⁹⁵

While I would agree with the last portion of that statement, there should be no reason why a jury trial waiver should not be permitted *when it has been determined that there has been a voluntary, intelligent, and knowing waiver*. So, instead of looking at the issue as not allowing jury waivers because they would not have met the voluntary, intelligent, and knowing standards, one can imagine the courts upholding the waiver only if it *does* meet these criteria, as discussed in Parts II and III.

Because jury trial waivers are less restrictive of employee rights than mandatory pre-dispute arbitration agreements,¹⁹⁶ it is logical that they should be broadly enforceable as well. Arbitration involves discarding the rights to not only a jury trial, but also to a judge, appellate review, and some discovery.¹⁹⁷ The Ninth Circuit, in *Grafton Partners LP v. Superior Court*, stated that “permitting pre-dispute [contractual] jury waivers . . . could be an attractive middle ground between jury

¹⁹² See Alleyne, *supra* note 116 at 385 (“The hidden motive behind the [*Gilmer*] decision is a widely held desire by judges . . . to reduce judicial caseloads in the face of burgeoning employment claims of all kinds.”).

¹⁹³ Sternlight, *supra* note 81.

¹⁹⁴ *Id.* at 23-24 (citing *Geldermann, Inc. v. Commodity Futures Trading Comm’n*, 836 F.2d 310, 316-21 (7th Cir. 1987)).

¹⁹⁵ *Id.*

¹⁹⁶ See Schultz, *supra* note 25.

¹⁹⁷ See Wingfield, *supra* note 187, at 17 (comparing the *Green Tree* court’s permissive view of arbitration clauses and the *Leasing Services* court’s more restrictive view of jury trial waivers and asking whether this “makes any sense.”).

trials, on the one hand, and arbitration, on the other.”¹⁹⁸ This “positioning” of the jury trial waiver between arbitration and a jury trial illustrates that the jury waiver alone gives up less rights than the arbitration agreement, and agrees with the logic of the holdings of *Beach*, *Birch*, and *Telum*.¹⁹⁹ Even without the “favored status” protection under the FAA, there is reason to believe that jury trial waivers are enforceable in pre-dispute contractual employment cases.²⁰⁰

IX. CONCLUSION

The right to a jury trial is of the utmost importance, embedded in the Constitution for over 200 years.²⁰¹ It should be carefully guarded, as are all fundamental rights. However, when two parties knowingly and voluntarily agree to contract around that right, their agreement should be honored. The knowing and voluntary standard can be applied to jury waivers outside of arbitration in the same manner as it is to contracts for arbitration to ensure that the party waiving his or her right is not being taken advantage of. Contracting around the right outside of arbitration can benefit both parties in many circumstances.

There is much support, as evidenced above, for upholding jury trial waivers outside of the employment context. As more employers and employees agree to contracts that include jury trial waivers in the employment context, litigation over such waivers will become more common, and the issue is bound to be settled. Courts should enforce jury waivers in employment contracts with the same regularity and the same standards with which they uphold them outside the employment context and with which they essentially uphold them in arbitration agreements. Bolstering this argument is the fact that there is also much support, in the employment context, for the ability of an employee to waive rights other than the right to a jury trial.

Bench trials are in many ways a superior option to both arbitration and full jury trials, and the case is strong for their acceptance as a replacement, in some circumstances, to both. Among other benefits, a bench trial can be less costly, quicker, provide for easier appeal, and eliminate runaway jury findings. The real test, as the use of jury trial waivers increases, is whether courts will uphold them with the same frequency as arbitration agreements, even assuming that jury waivers do not receive the same preferential status that arbitration does.

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¹⁹⁸ *Grafton Partners LP v. Superior Court*, 115 Cal. App. 4th 700, 711 n.10 (Cal. Ct. App. 2004) (even having stated this, the court refused to enforce the contractual jury trial waiver in this case).

¹⁹⁹ *See Telum, Inc. v. E.F. Hutton Credit Corp.*, 859 F.2d 835 (10th Cir. 1988); *Birch v. Al Castrucci, Inc. II*, No. CA 15123, 1995 Ohio App. LEXIS 3227, at *4 (Ohio Ct. App. Aug. 2, 1995); *Beach v. Burns Int’l Sec. Servs.*, 593 A.2d 1285, 1288 (Pa. Super. Ct. 1991).

²⁰⁰ One suggestion is including both a jury waiver and an arbitration clause, providing that the arbitration clause applies (as a back-up) if the jury trial waiver is not enforced.

²⁰¹ *See* U.S. CONST. amend. VII.